



United States Department of the Interior



In Response Reply To:
R8FWS/R8/

FISH AND WILDLIFE SERVICE
Pacific Southwest Region
2800 Cottage Way, Suite W-2606
Sacramento, California 95825

U.S. Army Corps of Engineers
Attn: CECW-CE, Douglas J. Wade
441 G Street, NW
Washington, DC 20314-1000

APR 22 2010

Dear Mr. Wade:

We appreciate the opportunity to comment on the Corps of Engineers' (Corps) Draft Environmental Assessment and Finding Of No Significant Impact on Policy Guidance Letter-Variance From Vegetation Standards For Levees and Floodwalls and Draft Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls (docket number COE-2010-0007). The following are comments of the Pacific Southwest Region (Region 8) of the U.S. Fish and Wildlife Service (Service). We recognize that human health and safety concerns must be of paramount priority. We recommend that the Corps (1) provide an exemption for existing vegetation variances or extend the timeline for submissions that involve existing vegetation variances, (2) defer to local/regional collaborative efforts, and (3) delay finalizing the process until relevant research by the Corps and other researchers has been completed. These points are discussed in more detail below; Attachment 1 contains some additional specific comments.

First, because existing levee vegetation is often important habitat for federally-listed species, we are concerned that losing existing variances will impede recovery of these species. We believe it is possible that existing variances could be lost because the levee vegetation variance process may be rarely used due to high costs combined with the perception that the likelihood of obtaining a variance is low. Obtaining a variance seems problematic because: (1) the guidance for implementation is currently unclear (as outlined in our specific comments in the attachment), (2) the process appears to require substantial time to complete, (3) the cost associated with developing a request may be prohibitive for many levee maintaining agencies, and (4) in its current form, the policy does not appear to take regional conditions into account. In addition, the amount of time between the completion of the Environmental Assessment/Finding of No Significant Impact (EA/FONSI) and December 31, 2010 (when requests for variances must be submitted), may be inadequate to complete a thorough submittal for any pre-existing variances or deviations. We recommend that the Corps provide an exemption for existing vegetation variances or extend the timeline for these submissions until at least December 31, 2011.

Second, because improving the reliability of the flood damage reduction system while sustaining or improving our natural resources is a major challenge in California, we have been working



collaboratively at the local level with the Corps, the California Departments of Water Resources and Fish and Game, the California Central Valley Flood Protection Board, and other interested parties. We have been cooperatively developing solutions to manage and maintain levees and other flood damage reduction features for public safety, while maintaining and enhancing riparian vegetation for the purpose of conserving fish and wildlife, including federally listed species and their habitat. These efforts have largely occurred through the California Levees Roundtable, the Interagency Flood Management Collaborative Program, and other efforts such as the California Levee Vegetation Research Program. These cooperative approaches have been critical to the successful implementation of recent projects, and are considered essential to meet the long-term goals of improving the State's flood control system while complying with existing State and Federal environmental laws. The California Levee Vegetation Research Program is a local effort to collaborate with the Corps on its national effort, while providing more focus on vegetation conditions and issues in the Central Valley.

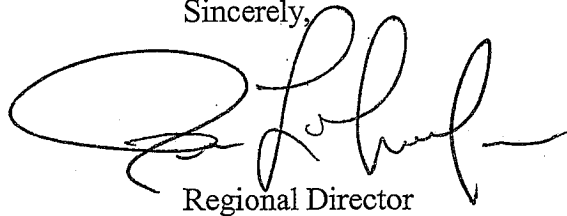
Based on discussions with representatives from the Corps, State, other Federal agencies, and local interests, we believe there is general agreement flexibility will help us meet multiple objectives, particularly given funding limitations within the State of California and local jurisdictions. Flexibility will allow local collaborative efforts to develop sustainable solutions. We believe California interests are making excellent progress towards sustainable solutions, and we do not want to see these efforts impeded by a policy which will reduce the ability of local entities to minimize flood risks and improve the environment.

We believe the Corps at a national level can contribute greatly to local efforts by recognizing regional differences that exist across the country. In the Water Resources Development Act (WRDA) 1996 Section 202(g), Congress recognized variation in levees and resources of different regions and locations of the United States. We also believe the Corps should dedicate staff and funds to research focusing on new engineering options to accommodate vegetation on levees, and should commit to additional research on the influence of vegetation on levee performance as the initial results of the current studies are analyzed and reported. We note that the Federal Emergency Management Agency recognized the need to be creative and environmentally sensitive when implementing flood control projects in their document, *Engineering and Nature, Alternatives Techniques to riprap bank stabilization*, PB2009-107826.

Finally, in April 2009, the Corps released Engineering Technical Letter (ETL) No. 110-2-571 which established guidelines for landscape planting and vegetation management at levees, floodwalls, embankment dams, and appurtenant structures. The ETL delineates minimum vegetation-free zones that include the levee crown, the water- and land-side levee slope and a 15-foot-wide margin (or existing easement) at the levee toe. The Corps acknowledged that existing scientific literature does not conclusively validate or invalidate current Corps levee vegetation standards and undertook a 2-year research program to gain more specific information on vegetation and its role in levee performance. We are concerned that the ongoing Corps' research effort needs more funding and time. In addition, other ongoing California levee vegetation research is not complete. We are concerned that neither research effort will be complete before the levee variance process is finalized. We recommend delaying finalization of the process until the research is completed.

The Service is committed to working with the Corps and others to develop alternative solutions for maintaining levees in a manner that improves flood control reliability while avoiding or minimizing potential adverse effects to fish and wildlife species. If you have any questions regarding these comments please contact Susan Moore, Field Supervisor of the Sacramento Fish and Wildlife Office at (916) 414-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "S. L. Huff", is written over the word "Regional Director".

Regional Director

cc:

Regional Director, Region 1, Portland, OR

Field Supervisor, Bay-Delta FWO, Sacramento, CA

NOAA Fisheries, Sacramento, CA

Secretary, California Natural Resources Agency, Sacramento, CA

Director, DWR, Sacramento, CA

Director, CDFG, Sacramento, CA

ATTACHMENT 1**U.S. Fish and Wildlife Service (Region 8) comments on *The Process For Requesting A Variance From Vegetation Standards For Levees and Floodwalls* and associated Draft *Environmental Assessment/Finding Of No Significant Impact*,
Docket Number COE-2010-0007, 75 Fed. Reg. 6374-68**

The rivers in the Central Valley of California are generally channelized with the levees forming the river banks. A system of dams and reservoirs, levees, weirs, bypasses, and other features were constructed in piecemeal fashion over the last 150 years. In the Sacramento Valley, some of the original system was purposely engineered to facilitate the flushing of hydraulic mining debris through the system. Later, as the flood control system was more fully developed, these narrow channels with their existing levees were incorporated, creating an engineering challenge to move flood flows through the system. The woody vegetation found on Central Valley levees is a significant portion of the remaining riparian habitat that provides nesting, foraging and cover habitat for migratory birds (including neo-tropical migrants, raptors, and others), overhead cover and shade that moderates water temperatures and energy input to river productivity at all trophic levels. This residual vegetation serves an important ecological role essential to the survival of numerous terrestrial and aquatic animals, and plant species throughout the Central Valley, including those in the Sacramento-San Joaquin River Bay-Delta—a region significant to the economy of the State of California. Included are federally listed threatened and endangered species whose survival as well as recovery, is directly or indirectly dependent on riparian habitat. Only about 5 percent of historic riparian habitat remains in the Central Valley, much of which exists on man-made levees.

Given this brief background, the Service has the following comments:

General Comments:

- Enhancement of allowable vegetation on levees in the Central Valley would assist in the recovery of several listed species, and the Corps has shared responsibility for recovery of listed species as outlined in the Endangered Species Act (ESA). Section 7(a)(1) requires Federal agencies to review and administer their programs to carry out the ESA's purpose to conserve federally listed threatened and endangered species and the habitat upon which they depend. Under section 7(a)(2) of the ESA (16 U.S.C. §1536), Federal agencies are directed to ensure that their activities are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.
- Depending on the season in which the vegetation is removed, removal of an active nest could violate the Migratory Bird Treaty Act. The Migratory Bird Treaty Act provides that it is unlawful to pursue, hunt, take, capture or kill; attempt to take, capture or kill; possess, offer to or sell, barter, purchase, deliver or cause to be shipped, exported, imported, transported, carried or received any migratory bird, part, nest, egg or product, manufactured or not. Issuing a variance may assist in protecting nesting migratory birds from some maintenance activities.

- The California Central Valley is a joint venture for migratory birds. This joint venture is a self-directed partnership of agencies, organizations, corporations, tribes, or individuals that has formally accepted the responsibility of implementing national or international bird conservation plans within a specific geographic area or for a specific taxonomic group and has received general acceptance in the bird conservation community for such responsibility. The Corps' Sacramento District is one of the partners of the Central Valley Joint Venture. The 2006 Joint Venture plan has a goal to create and enhance 7,000 acres of riparian habitat for riparian songbird breeding within the Central Valley within the next 5 years. Vegetation variances within portions of Central Valley levee systems may be the only way to allow this goal to become a reality.
- The amount of time between the completion of the Environmental Assessment/Finding of No Significant Impact (EA/FONSI) and December 31, 2010, may be inadequate to complete a thorough submittal to request a variance for any pre-existing variances or deviations. We recommend extending the timeline until December 31, 2011. This would allow for additional research to be reported, continued local collaboration, and feedback on requests for variances already submitted to the Corps.
- Obtaining a variance seems problematic because: 1) guidance for implementation is currently unclear (as outlined in our specific comments later), 2) the amount of time needed to go through the process appears to be extensive, 3) the cost associated with developing a request may be prohibitive for many levee maintaining agencies, and 4) in its current form, the policy does not appear to take regional conditions into account.
- Denying an existing variance would be a Federal action that could further harm listed species and put additional species at risk.
- Compliance with the Corps' ETL will require a great deal of habitat compensation (assuming such impacts can be compensated) under the Clean Water Act. We are concerned that sufficient on- and off-site compensatory sites may not be available.

Draft EA/FONSI comments:

It is unclear why this Policy Guidance Letter is not a "Major Federal action" as defined in the Council of Environmental Quality's Regulation 1508 (Sec 1508.18), which requires an Environmental Impact Statement for such actions. A "Major Federal action" includes actions with effects that may be major and which are potentially subject to federal control or responsibility. Actions are defined to include "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, policies, or procedures; and legislative proposals."

Embedded within the description of the proposed administrative process is a decision point that may result in an action or actions that could result in significant effects to the human

environment. Specifically, the administrative process includes the option to rescind existing variances, and thereby, creates the possibility of impacts to the human environment that would not otherwise occur. Therefore, we recommend that the Corps re-evaluate whether an Environmental Impact Statement be part of the process of promulgating the variance process. Even though the word "may" is used to establish the possibility of retaining existing agreements, we believe it is likely, given the requirements of the proposed variance process, that this action would result in the loss of a substantial number, if not all, waivers in Region 8. The loss of waivers in Region 8 could cause the loss of significant environmental resources associated with the removal of already severely depleted riparian habitats that have become established on levees. This action requires a complete analysis of impacts and alternatives under NEPA, and perhaps consultation under Section 7 of the Endangered Species Act (ESA), depending on location. We recommend that the policy either be amended to remove the requirement to submit applications to maintain or modify existing waivers or that the Corps' complete a NEPA review along with any necessary ESA consultation, prior to finalization of the waiver process. To ensure a complete disclosure of the potential environmental effects of the proposed change in the Corps policy, the Corps should insure its review includes the environmental compliance documentation for the Corps' existing program under Public Law 84-99 and any variances, agreements, or other deviations therein.

Specific Comments on the Draft Process for Requesting a Variance From Vegetation Standards for Levees and Floodwalls comments:

At the February 25, 2010, California Levees Roundtable meeting and the February 26, 2010, Interagency Partnering meeting the Corps committed to clarifying the Policy Guidance Letter and the process to obtain a variance prior to finalizing the Policy Guidance Letter. The following comments indicate where we believe clarification is needed.

Section 4. Background. The draft language states: *"In general, the resulting policy set forth in ER 500-1-1 ... allowed the project sponsor of a levee, in active status, to seek a variance from USACE standards to allow additional vegetation on or near levees when such vegetation would preserve, protect, and/or enhance natural resources and /or protect rights of Native Americans."*

We believe the use of the word *near* should be clarified. Our understanding is the vegetation free zone is 15 feet measured from the toe of the levee or the distance in which the Corps has an easement. Therefore, we conclude that new vegetation beyond this area should not require a variance.

This section also cites WRDA and includes the idea that the Corps is to address regional variances in levee management and resource needs. The policy guidance letter interprets that purpose as requiring a single uniform policy. However, the wording of WRDA recognizes variation in need, and therefore, provides for regional differences. The current regional approach by the California Levees Roundtable in California is consistent with WRDA and better addresses regional needs than the proposed guidance.

Section 6. Process. Section 2b-e describes the steps to obtain a variance. A timeline for how long the entire process could take should be included. The Agency Technical Review (ATR) is "not to exceed 90 days... unless special circumstances warrant additional time." Given that the

sponsor is required to provide the documentation outlined in Section 11 Environmental Compliance, we are concerned that the entire process could take a year or more to complete. Given the potential number of levee segments where a variance may be sought in a State such as California, it seems unlikely that a variance could be obtained in a timely manner.

Section 6. Process. Section 2b. We request clarification on what the Levee Safety Officer might be required to consider or steps the LSO might be required to take in developing the recommendation for acceptance or non-acceptance to the District Commander. Understanding any mandatory considerations will help requestors prepare the Vegetation Variance Request.

Section 6. Process. Section 2c. An explanation of the Regional Integration Team process would be helpful.

Section 6. Process. Section 2c. The variance must be shown to be necessary, and the only feasible means, to preserve, protect, and enhance natural resources, and/or protect the right of Native Americans, pursuant to treaty, statute or Executive Order. We suggest that those conducting the Agency Technical Review include individuals representing these interests.

Section 6. Process. Section 2f. *"The district shall notify the appropriate regional offices of the federal resource agencies when a vegetation variance request has been received."* The purpose of this notification should be clarified; it is currently unclear what, if anything, is expected from the resource agencies in response to a notification.

Section 7. Vegetation Variance Request. Section c(4). We believe Section 7(c)(4) assumes that the presence of vegetation on or near the levee is adverse to levee reliability. We believe this may not always be the case. Currently, the Corps is conducting research through its Engineer Research and Development Center which may provide better data upon which to judge system reliability. In addition, research is also being conducted in California addressing vegetation issues and levee stability. Those conducting the Corps and California research efforts are collaborating, and the research efforts complement each other. We recommend that the Corps delay promulgation of the final variance language until the initial Corps and California research efforts are completed and reported.

Section 7. Vegetation Variance Request. Section e. *"An engineering analysis showing that the changes proposed will result in conditions consistent with the criteria in 6.a.(2)."* A further explanation of "engineering analysis" would clarify what is needed to comply with this request. An example of the various methods of conducting an engineering analysis would also be helpful.

Section 9. Special Considerations. Section 9a. *"Variances will be considered for individual levee systems or portions thereof."* Clarification on what constitutes an "individual levee system or portions thereof" as well as a "feature" or "segment within a levee system" would be helpful (see Section 5 Definition of a Levee System in the guidance). In some cases, the levee system may be for a major river maintained by multiple levee maintaining agencies, which may or may not have the resources to develop a vegetation variance request. However, these agencies may be facing the same issues, and collaboratively they may have the resources to apply for a variance.

Section 9. Special Considerations. Section 9b. *"The vegetation variance request process does not apply to embankment dams and their appurtenant structures, channels, or shore-line or river-bank protection systems such as revetments, sand dunes, and barrier islands."* An explanation or definition of "channels" and "river-bank protection systems such as revetments" would clarify where the process does not apply.

Section 9. Special Considerations. Section 9e. The reasoning behind stating no vegetation variances shall be granted for *"the following portion of a levee: The upper third of the river-side (or flood-side) slope, the crown, the land-side (or protected-side), or within 15 feet of the land-side (or protected-side) toe (subject to preexisting right-of-way)"* should be provided. If there are sections of levee or systems which meet the criteria for a variance, we believe they should be eligible for consideration, regardless of where the vegetation is found.

Section 9. Special Considerations. Section 9g. *"For areas in which ESA considerations exist, the district can apply for a variance in conjunction with planning and design of future rehabilitation under PL 84-99 and associated measures needed to comply with ESA."* We request clarification of this statement. Given the engineering analysis necessary, and the review process, it seems unlikely a variance would be approved prior to construction of a PL 84-99 project.

Section 10. Existing Variances or Other Deviations. The California Levees Roundtable, a collaborative partnership of senior Federal, State, and local agency officials, was formed to address vegetation issues affecting the Federal and State levee systems in California's Central Valley. The Roundtable developed California's Central Valley Flood System Improvement Framework (Framework). The Framework established interim criteria for levee vegetation that allows vegetation to remain in place on levees while the State pursues the development of the Central Valley Flood Protection Plan (CVFPP) by 2012. The Framework allows Central Valley levees to maintain eligibility under PL 84-99 until the CVFPP is developed. Continued eligibility after 2012 would be evaluated based on the content of the CVFPP and results of the local and national research work addressing levee vegetation. We request clarification on how this section bears on the Framework that the Corps and others signed and on whether the Framework will be honored through 2012, given that the framework was *"not submitted for an ATR via the process described"* in the Federal Register notice *"... by 30 September 2010."* We believe the Framework is valuable and should remain in place.